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In the Supreme Court of the United States

OCTOBER TERM, 1987

SALVADOR W. PORTO,
Petitioner,

vs.

ARMCO INC. and ARMCO INC. BENEFIT PLANS ADMINISTRATIVE COMMITTEE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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2/88

QUESTION PRESENTED FOR REVIEW

Whether the Employee Retirement Income Security Act (ERISA) and its implementing regulations impose a requirement that all plan participants receive exactly the same form of notice of material modifications to a plan at exactly the same time so long as the plan participants receive timely notification of the modification within the period set by ERISA?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Armco Inc. [Armco][1] and Armco Inc. Benefit Plans Administrative Committee [BPAC] respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion in this case by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 825 F.2d 1274 (8th Cir. 1987). The other opinions are listed in petitioner's appendix.

1. The listing of Armco Inc.'s parent companies, subsidiaries and affiliates as required by Supreme Court Rule 28.1 appears in the Appendix at page A1.

JURISDICTION

This action was removed to the United States District Court for the Western District of Missouri, Western Division, from the Circuit Court of Jackson County, Missouri, pursuant to 28 U.S.C. § 1441, in that the civil action was one in which the federal district court had original jurisdiction pursuant to 28 U.S.C. § 1332 because the matter in controversy exceeded the sum or value of $10,000 and was between citizens of different states and pursuant to 28 U.S.C. § 1331 because the matter arose under the laws of the United States.

On petitioner's appeal, the clerk for the United States Court of Appeals for the Eighth Circuit entered an order on August 10, 1987 affirming the district court's order granting summary judgment to defendants. Petitioner moved for an en banc rehearing which was denied on October 12, 1987.

Petitioner asserts that the jurisdiction of this Court rests upon Supreme Court Rule 17.1 in that a lower federal court has decided an important question of federal law which should be settled by this Court. Petitioner apparently attempts to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 1024(b)(1)

29 U.S.C. § 1104(a)(1)(A) and (B)

29 C.F.R. § 2520.104b-1(b) (1987)

29 C.F.R. § 2520.104b-3(b) (1987)

These statutes and regulations are set forth fully in the Appendix at pp. A4-A7.

STATEMENT OF THE CASE

The sole issue raised by petitioner in this case is whether a plan administrator of an employee welfare benefit plan must ensure that all plan participants receive notification of modifications to the plan at exactly the same time even though the participants are timely notified pursuant to ERISA.

On January 31, 1981 petitioner retired from Armco Inc.'s [Armco] Kansas City facility. During his employment, petitioner had been a participant in the Armco Inc. Thrift Plan [Thrift Plan]. Armco was the plan sponsor; Armco Inc. Benefit Plans Administrative Committee [BPAC] was the named Thrift Plan administrator; and Mellon Bank, N.A. (an unserved defendant) was the Thrift Plan trustee. The Thrift Plan at issue in this case is a nation-wide thrift plan which, on December 31, 1981, had 12,290 participants scattered across the United States.

When he retired in 1981, petitioner made what was then an irrevocable decision to defer receipt of a portion of the funds held for his benefit in the Thrift Plan. In January 1982 the Thrift Plan adopted an amendment to permit petitioner's once irrevocable decision to defer distribution upon retirement to become revocable because of a change in the federal tax law.

The local plan administrator at the Kansas City, Missouri plant, appointed by BPAC, sent a letter to all *local* employed plan participants on or about February 1, 1982 advising them of several changes in the Thrift Plan affecting active employees only including the change that an active employee who retired after January 1, 1982

could later change his or her decision on distribution of Thrift Plan amounts after retirement. The letter was not sent to the local retired participants in the Kansas City area such as petitioner.

The parties stipulated[2] Armco would testify that on or about April 29, 1982 a plan prospectus was mailed to *all* plan participants across the nation, active *and retired,* by first-class, postage prepaid, mail. The parties also stipulated that while petitioner claimed he did not receive this plan prospectus Armco had no record that any plan prospectus addressed to petitioner was returned to Armco. Petitioner testified in his deposition that had he received and read the April 1982 prospectus he would have been notified of this modification.

It is undisputed that petitioner received actual notification of the modification in October 1982 when he met with the local administrator who informed petitioner that his previous decision to delay distribution of the remaining amounts was no longer irrevocable. However, petitioner still continued to leave his funds within the Thrift Plan.

Petitioner admitted that he again had notice in March 1983 when he received a summary plan description clearly setting forth the modification. However, petitioner further waited until April 1985 to liquidate his account—almost two and one-half years after he admitted that he received actual notice in October 1982. During that time he bypassed opportunities to recoup his losses and waited to liquidate his account until a time that his stock was less than half of the value it was in October 1982.

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2. This action was tried to the United States District Court for the Western District of Missouri, Western Division on cross motions for summary judgment on liability only and upon stipulated facts, deposition testimony and other designated evidence.

The district court held that Armco could not be held liable for any alleged breach of fiduciary duty as its duty was limited to the selection of a proper plan administrator and there was no allegation that Armco was negligent in that selection. The district court further held that there had been no breach of duty by BPAC, fiduciary or otherwise, since petitioner had received timely notification under ERISA and even though petitioner did not receive notice of the modification at the same time that active employees at the Kansas City plant received notice. Petitioner appealed to the Eighth Circuit only from the judgment in favor of the plan administrator.

ARGUMENT

Petitioner has advanced two reasons for granting his petition under Supreme Court Rule 17.1. Neither reason is substantiated by his argument and neither is sufficient for this Court to grant his petition.

The Decision of the Eighth Circuit Does Not Involve an Important Question of Federal Law Which Was Incorrectly Decided

Petitioner urges this Court to grant his petition on the ground that the Eighth Circuit has decided an important question of federal law which has not been but should be settled by this Court. This is not an important question which needs this Court's decision because ERISA clearly sets forth the time limits within which a plan administrator has to disclose a material modification of an employee benefit plan.

29 U.S.C. § 1024(b)(1) imposes upon plan administrators a duty to furnish a summary description of a

material modification not later than 210 days after the end of the plan year in which the change is adopted (July 29, 1983 in this instance). Petitioner received notification of the modification substantially before that deadline elapsed—twice by his own testimony.[3]

The statute clearly sets forth the notification guidelines. There is no question that petitioner received sufficient and timely notice.

Petitioner argues, however, that BPAC breached some alleged fiduciary duty[4] to petitioner because he did not receive notice that his previous decision to defer distribution of his Thrift Fund assets was no longer irrevocable at the same time the local plan administrator gave notice to actively employed Kansas City Thrift Plan participants that their *future* decisions made upon their retirement about distribution of Thrift Plan funds would not be irrevocable.

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3. Petitioner admitted he received actual notice that he could liquidate his Thrift Plan account in October 1982 from the local plan administrator and again when he received a copy of a summary plan description in March 1983 clearly setting forth the modification. 29 C.F.R. § 2520.104b-3(b) (1987) (summary plan description incorporating material modification is an acceptable method of disclosure). While petitioner denied receiving the April 1982 prospectus, which he admitted would have notified him of the modification, actual receipt of the notice was not required since the prospectus was sent to all participants, active and retired, by first class mailing. 29 C.F.R. § 2520.104b-1(b); *Vaughan v. Metal Lathers Local 46 Pension Fund*, 474 F. Supp. 613, 620 (S.D. N.Y. 1979), *aff'd*, 626 F.2d 237 (2nd Cir. 1980).

4. Plaintiff characterizes the plan administrator's duty as a fiduciary duty. The duty to notify of a material modification is contained in Part I of ERISA and not in Part IV of ERISA which deals with fiduciary duties. See discussion and dictum in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) distinguishing between duties of an administrator found in Part IV and Part V.

The Thrift Plan had over 12,000 participants (both employed and retired) at the time the modification was adopted who were scattered across the nation. The district court found that neither the statute nor the regulations imposed a requirement that all participants receive exactly the same form of notice at exactly the same time nor was it a breach of fiduciary duty under 29 U.S.C. § 1104 for administrators to provide different types of notice to active and retired employees so long as all participants were timely notified.

Petitioner wants this Court to change ERISA's 210-day notification provision by imposing a fiduciary duty upon plan administrators to ensure that every participant receives notice of a material modification at exactly the same time. This would impose an impossible burden on plan administrators who must deal with widely scattered and different types of participants. It could impose fiduciary liability on plan administrators where participants were inadvertently not notified or notified in a manner differently than others. Congress surely did not intend the imposition of such liability and thus specifically set forth the standards governing disclosure.

The Eighth Circuit Decision Does Not Conflict With Decisions of Any Other Federal Appellate Court

Petitioner contends in his argument the Eighth Circuit has decided an important question of federal law which conflicts with prior holdings of other lower federal courts. Not only is this an inaccurate statement since petitioner himself argues this is a case of first impression, but also the purported conflict with *lower* federal court decisions is not sufficient reason to grant his petition.

Rule 17.1(a) indicates a petition for certiorari may be considered when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of *appeals* on the same matter. The petitioner requests this Court grant his petition because he claims that the Eighth Circuit's decision conflicts with decisions of two federal *district* courts.

Petitioner cites the Court to *Winpisinger v. Aurora Corp. of Illinois, Precision Castings Division*, 456 F. Supp. 559 (N.D. Ohio E.D. 1978), and *Talarico v. United Furniture Workers Pension Fund A*, 479 F. Supp. 1072, 1080 (D. Neb. 1979). Neither of these cases deals with the issue at hand, much less being conflicting decisions of another court of appeals. In *Winpisinger*, as the district court noted, the discussion of the ERISA fiduciary duty arose out of evaluation of the trustees' retroactive cancellation of the past service credit of a special class of employees. *Talarico* involved a situation in which the employer contributions to a pension fund were being refused by the fund because those contributions did not cover all employees. Neither case lends any authority to the proposition that a fiduciary duty is breached if timely notice is provided to all participants in a plan even though by varying means and at varying times. Neither case involves issues of disclosure of material modifications whatsoever. Neither case is an appellate court decision in direct conflict with the Eighth Circuit's holding in this case.

CONCLUSION

Petitioner's argument for grant of certiorari does not present any special or important reasons for this Court to exercise its discretion in granting his petition. There are no conflicting opinions within the federal judiciary system (appellate or otherwise) nor is this an important question of federal law which should consume this Court's time. The governing statute clearly sets forth the mandatory time frame in which plan administrators must discharge their duties to notify of a material modification and this duty was clearly met.

Respectfully submitted,

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APPENDIX

RULE 28.1 LISTING OF CORPORATE PARTY

Although petitioner has designated Mellon Bank, N.A. in the caption of his petition, Mellon Bank, N.A. was never served a copy of the summons and complaint and has never appeared in the case in the courts below. Therefore no appearance is made on behalf of Mellon Bank, N.A. and no Rule 28.1 listing is furnished.

The parent company, subsidiaries and affiliates of Armco Inc. are:

Acerex; Acerco S.A.; Aceros Comerciales Peru S.A.; Aceros Del Orlente S.A.; Aceros Del Sur S.A.; AH (UK) INC.; AIGI Leasing, Inc.; Armco AB; Armco ApS; Armco Advanced Materials Corporation; Armco Argentina S.A.; Armco Canada Ltd.; Armco Caribbean Corporation; Armco Chile S.A. Sociedad Anonima; Armco Colombiana S.A.; Armco Colombo; Armco Dinslaken GmbH; Armco D.O.; Armco Equipetrol S.A.; Armco Finance (UK) Ltd.; Armco Financial Holdings Corporation; Armco Financial Services Corporation; Armco Financial Services Europe Limited; Armco Financial Services, Inc.; Armco Financial Services International, Inc.; Armco Financial Services International, Ltd.; Armco Flexal B.V.; Armco GmvH; Armco Grinding Systems; Armco Industrial S.A.; Armco Industries (Nigeria) Ltd.; Armco Instapanel S.A.; Armco Insurance Group Inc.; Armco International, Inc.; Armco International Insurance Company of Bermuda; Armco Investment Management, Inc.; Armco Limited; Armco Management Corporation; Armco Marsteel Alloy Corporation; Armco Merchan-

dising Limited; Armco Merchandising S.A.; Armco Moly-Cop S.p.A.; Armco National Re Incorporated; Armco National Supply (Australia) Pty. Ltd.; EXIM Overseas; Armco Overseas Manufacturing Corporation; Armco Pacific Financial Corporation; Armco Pacific Financial Services Limited; Armco Pacific Investments, Inc.; Armco Pacific Limited; Armcopaxi S.A.; Armco Peruana S.A.; Armco Realty Corporation; Armco Resources Pty. Ltd.; Armco S.A.; Armco S.A. (Spain) Spanish; Armco SARL; Armco SDT Limited; Armco Services S.A.M.; Armco Shipping Limited; Armco (South Africa) (Proprietary) Limited; Armco Steel Corporation; Armco Steel Processing Company; Armco Syndicate Ltd.; Armco Trust Limited; Armco Underwriters Agency, Inc.; Armco Uruguaya S.A.; Armco Venezolana S.A.; Armco Wire Company; Artex Constructors, Inc.; Atlantic National Insurance Company, Ltd.; Australian Steel & Mining Corporation Pty. Ltd.; Autometrics Co.; P.T. Bakrie-Armco; Baltimore Speciality Steels Corporation; Bellefonte Underwriters Insurance Company; Black River Lime Company; B.N.L.M.S. Limited; BN Underwriting Management Limited; British National Insurance Company of Bermuda Ltd.; Bundy Venezolana C.A.; C.A. Armco Venezolana; C.A. Tubos Armco; Armco Colombo S.P.A.; Compass Insurance Company; Continental Western Industries, Inc.; Control International, Inc., The Cumberland Group, Inc.; D.I.F.S.-I.C.A.; ENCORP INC.; Everest International, Inc.; EXIM Overseas Inc.; Falconbridge Dominicana C.porA.; First Taconite Company; Charles Fulton (Asia) Holdings Ltd.; Charles Fulton (Australia) Pty. Ltd.; Charles Fulton (Malaysia) Sendirian Berhad; Charles Fulton (Singapore) Holdings Ltd.; Charles Fulton (Singapore) 1982 Ltd.; Hangar Facilities, Inc.; In-

dustrias National Supply C.A.; Inmobillara Hierro y Accro, S.A.; Insurance Management Corporation; Inversiones Armco C.A.; Metaltubos C.A.; MINARMCO S.A.; National Supply Company, Inc.; The National Supply Company of Mexico, S.A.; National Supply France S.A.R.L.; National Supply Stores Pte. Ltd.; NN Administration, Inc.; NN Risk Management Services, Inc.; North Atlantic Management Company Limited; Northern Automatic Electric Foundry, Inc.; Northern Land Company; Northwestern National Casualty Company; Northwestern National Insurance Company; Obras Civiles e Industrias C.A.; Pacific Automobile Insurance; Pacific National Insurance Company; Productos Metalicos Armco S.A.; Prolansa; Reserve Mining Company; Strata Energy, Inc.; Talbico, Inc.; Tercad Limited; United Lubricants Corporation; Universal Reinsurance Corporation; Virginia Horn Taconite Company; Westchester Nominees Ltd.; Winning Post Investment Ltd.; ME International (with Stelco Inc. and Armco Inc.); National-Oilwell (Armco Inc. and U.S.X.)

Armco Inc. Benefit Plans Administrative Committee is an unincorporated committee appointed by Armco.

STATUTES AND REGULATIONS

1. 29 U.S.C. § 1024(b)(1):

(b) *Publication of summary plan description and annual report to participants and beneficiaries of plan*

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary), within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section

1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

2. 29 U.S.C. § 1104(a)(1)(A) and (B):

(a) *Prudent man standard of care*

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

3. 29 C.F.R. § 2520.104b-1(b):

(b) *Fulfilling the disclosure obligation.* (1) Where certain material, including reports, statements and documents, is required under Part 1 of the Act and this part to be furnished either by direct operation of law

or on individual request, the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries. Material which is required to be furnished to all participants covered under the plan and beneficiaries receiving benefits under the plan (other than beneficiaries under a welfare plan) must be sent by a method or methods of delivery likely to result in full distribution. For example in-hand delivery to an employee at his or her worksite is acceptable. However, in no case is it acceptable merely to place copies of the material in a location frequented by participants. It is also acceptable to furnish such material as a special insert, in a periodical distributed to employees such as a union newspaper or a company publication if the distribution list for the periodical is comprehensive and up-to-date and a prominent notice on the front page of the periodical advises readers that the issue contains an insert with important information about rights under the plan and the Act which should be read and retained for future reference. If some participants and beneficiaries are not on the mailing list, a periodical must be used in conjunction with other methods of distribution such that the methods taken together are reasonably calculated to ensure actual receipt. Material distributed through the mail may be sent by first, second, or third-class mail. However, distribution by second or third-class mail is acceptable only if return and forwarding postage is guaranteed and address correction is requested. Any material sent by second or third-class mail which is returned with an address correction shall be sent again by first-class mail or personally delivered to the participant at his or her worksite.

4. 29 C.F.R. § 2520.104b-3(b):

> (b) The summary of material modifications to the plan or changes in information required to be included in the summary plan description need not be furnished separately if the changes or modifications are described in a timely summary plan description. For example, a calendar year plan adopts a material modification on June 3, 1976. The modification is incorporated in a summary plan description furnished on July 15, 1977. No separate summary of the material modification is furnished. The plan adopts another material modification September 15, 1977. A separate summary of the modification is furnished on or before July 29, 1978.